No. 92-1479

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 29.1 LIST

The List of Parties and Rule 29.1 List published at pages ii-iv of the Petition for Writ of Certiorari, are reiterated herein as if copied *in extenso.*

The "Rule 29.1 List" appearing at page iii of Respondents' Opposition is, on information and belief, deficient by its failure to list River Don Castings, Ltd., its parent and sister companies, if any, and by its failure to list the subsidiaries, affiliates, and partnerships of United Dominion Industries.

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Petitioner, McDermott Incorporated (hereinafter "McDermott") respectfully submits this, its Reply Brief, and prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on 11 December 1992.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents admit in their "Statement of the Case" that: a) the trial court precluded McDermott's assertion of contract law claims against River Don;[1] and b) that "the Fifth Circuit also refused to notice a box full of proffered evidence of McDermott's Shearleg Crane damages, and denied McDermott its right to present this evidence to a jury." Thus, Respondents do not dispute the facts of these errors below.

REPLY TO RESPONDENTS' ARGUMENT

Respondents do not address Petitioner's argument and law; rather, they merely repeat some of Petitioner's arguments in the negative, and self-servingly assert that the rulings below were correct.

I. THE *SELF/LEGER* "CREDIT FOR SETTLEMENT" CONFLICT

Respondents claim there is no conflict. The Chairperson of the Maritime Law Association Committee on Uniformity disagrees. L. Burrell, "Uniformity in Maritime Law," 5 U.S.F.Mar.L.J. 67 (Fall 1992). See also E. Johnson,

[1] Respondents' statement that, "McDermott did not object to nor seek reconsideration of the proclusion [sic] of a contract claim against River Don." is simply false. Please see Plaintiff's "Memorandum in Support of Motion to Reconsider Claims Denied Pursuant to East River," filed during trial of this matter, reproduced in the Supplemental Appendix hereto.

"The Conflicting Doctrines of *Self* and *Leger*: The Unsettling Uncertainty of Settlement in Admiralty," 41 Ala.L.Rev. 471 (Winter 1990).

The Eighth Circuit, in *Associated Electric Corp. v. Mid-American Transportation Corp.*, 931 F.2d 1266 (8th Cir. 1991) is in direct conflict with the Fifth and Eleventh Circuits on the "credit for settlement" issue and the scope of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed. 2d 521 (1979). Respondents attempt to deny this conflict by an *argumentum ad hominem* denigration of the Eighth Circuit's scholarship in *Associated Electric*'s express rejection of *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) and adoption of the "pro rata" approach of *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Bald denial of this obvious, well documented and much litigated problem cannot obscure the fact that the Circuits are in conflict. Trial courts, litigants and legal scholars find maritime law in disarray and urgently in need of the unifying consideration of this Honorable Court's review on the issues raised by non-settling tort-feasors' attempts to obtain credit for settling tort-feasors' private, independent resolution of their own liabilities with plaintiffs.[2]

[2] Since filing of the Petition herein, the Alabama Supreme Court, in *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp., et al.*, slip opinion, 1993 WL 154448 (Ala. May 14, 1993), noted the Eleventh Circuit's "wrong turn" in the *Self* line of cases and held that *Leger* represented the correct rule of federal maritime law.

The Seventh Circuit has also entered the fray with *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), disagreeing with *Leger* and *Associated Electric*, but deferring its choice

The late Judge Brown and Judges Barksdale and Johnson of the Fifth Circuit acknowledged the conflict in *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992). In *Williams v. Fab-Con, Inc.*, 990 F.2d 228, 233 (5th Cir. 1993), the Court acknowledged,

> " . . . that *Hernandez* and *Leger* are at odds, but our recent opinion in *McDermott, Inc. v. Clyde Iron, et al.*, 979 F.2d 1068 (5th Cir. 1992); clearly holds that the rationale expressed in *Hernandez* is the law of this Circuit. Because the district court did not have the benefit of our decision in *McDermott*, we vacate the damage award to Fab-Con and remand for reconsideration by the district court."

Of course, the *McDermott* district court was also denied the dubious benefit of the Fifth Circuit's adulterous embrace of *Self*, despite *Leger. Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.), cert. denied, 488 U.S. 981 (1988) was then but an aberation in settled Fifth Circuit jurisprudence. Yet the Court of Appeals, even with evidence of "Shearleg Crane damages" to which McDermott's settlement with the "sling defendants" was at least partially attributable, unjustly reversed and declined to remand in identical legal circumstances to *Williams*. *Williams* shows that even if *Hernandez* is now the law of the Fifth Circuit, equal protection and due process of law require the Fifth Circuit to remand this case to the trial court to resolve the "credit for settlement" issues.

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between settlement bar and unbridled contribution approaches. The Court expressly declined to consider the effect of strict liability on this question.

Certiorari should be granted, if for no other reason, to order such remand.

II. REPLY TO RESPONDENTS' ATTEMPTS TO EVISCERATE MARITIME PRODUCTS LIABILITY

After seven years at sea, powered only by underperforming turbines, and after innumerable collisions with catastrophic losses and commercial realities, *East River*[3] is in serious need of a dry docking. The present case reveals breaches in *East River's* hull that cannot be "patched over" with warranty paper. If she is left to ground where Respondents and the Fifth Circuit have navigated her, she will be an obstruction to just navigation in maritime law – a "hard case" that made "bad law."

A. RESPONDENTS CANNOT DROWN MARITIME TORT LAW IN A CONTRACTUAL PUDDLE

AmClyde's "Contract for Supply of 5000 Short Ton Shearleg Derrick" had nothing to do with the Snapper Deck, damaged due to the Shearleg Crane's catastrophic failure. The Shearleg Crane was not " . . . specifically designed to be used in the picking up [sic] the deck . . . ,"[4] like a $7.5 million, "one-shot" disposable piece of equipment.

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[3] *East River S.S. Corp v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986).

[4] Opposition brief at page 7. The trial record shows that the Shearleg Crane was being purchased to perform certain types of marine heavy lifts, including, *inter alia*, the SNAPPER Deck installation.

East River and Petitioner say that where the *only* loss suffered is the product's failure to perform as warranted and the parties are in a commercial relationship, remedies for breach of warranty and consequential damages are provided by contract/warranty law (including remedies available on breach of contract or a warranty's failure of essential purpose). Respondents and the Fifth Circuit say – contrary to *East River*'s express holding that damage to "other property" is recoverable in tort/strict liability[5] – that a contract pertaining to the "product itself" can be globally extended to any and all damage to persons or other property. Respondents' argument would limit William Higgins, an officer of McDermott who signed the initial contract, to free repair or replacement of the defective part of the crane, if he had been crushed when it broke.

Application of the alleged contractual waiver of tort liability, upon which Respondents wholly rely, also presupposed that AmClyde had fulfilled its warranty obligations by repairing or replacing the defective parts "free of charge." However, AmClyde did charge McDermott and lost its counterclaim at trial to collect those charges. The trial court's refusal, in the face of these and other genuine issues of fact, to submit McDermott's contract/warranty or tort/product liability cases on Shearleg Crane damages against AmClyde to the jury only amplifies the extent to

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[5] Strict liability should not be contractually waivable. Restatement (Second) of Torts § 402A, comment m (1965); *Pratt & Whitney Canada, Inc. v. Sheehan, et al.*, slip opinion, 1993 W.L. 183095 (Alaska May 28, 1993), surveying cases on reconsideration of *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981) in light of *East River*.

which the courts below have misconstrued and overreached this Honorable Court's decision in *East River*, unjustly to foreclose McDermott's recovery of genuine physical catastrophic damages under either tort or contract law from AmClyde.

Respondents' closing dissertation on "risk as a function of commerce" reflects a view repudiated in the common law nearly a century ago. *East River* plainly stated the most basic principle of tort/products liability: it is the business of the law, where an accident causes physical damage, to place responsibility upon the party best able to ameliorate the risk. AmClyde and River Don as designers, sellers and manufacturers of the Shearleg Crane and its hook were best positioned, as the jury's findings on causation show, to prevent the unreasonable danger that produced this catastrophe. The risk *which actually materialized* in this case was not purely economic, as commercial entities may reasonably bargain over; rather, it was the risk of an unreasonably dangerous, actually damaging product of huge proportions. No one expects to be or should be " . . . forced to bargain for reasonable product safety."[6]

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[6] "Note: *East River Steamship Corp. v. Transamerica Delaval, Inc.*: Admiralty Law – Recovery for Losses Caused by Product Self-Injury," 61 Tul.L.R. 1229 (1987).

B. McDERMOTT PRESERVED BOTH WARRANTY AND TORT CLAIMS FOR ITS SHEARLEG CRANE DAMAGES AGAINST RIVER DON AND AMCLYDE AND MUST BE PERMITTED TO TRY ITS DAMAGES UNDER ONE OR THE OTHER OR BOTH THEORIES TO A JURY.

Respondents only dispute McDermott's preservation of warranty claims against River Don, tacitly admitting that, at the least, McDermott has been denied the right to try its Shearleg Crane damages against River Don on tort theories. Since River Don's tort liability was determined in the trial court, this is an instance in which a summary remand for trial of the Crane damages, subject to the prior liability findings, would economically provide relief consistent with due process.

Respondents raise no further argument against McDermott's request for remand to try its Shearleg Crane damages against AmClyde under either tort or contract. AmClyde's liability under both theories having already been tried, remand for trial of the Crane damages only would also provide an economic remedy to the deprivation of due process suffered below.

McDermott requests that this Honorable Court review Respondents' quotations from the record in *pari materia* with the further argument and rulings in the trial court, excerpted at Petition Appendix pp. A-40-49, reflecting McDermott's objections to and request for reconsideration of the trial court's initial preclusion of all Crane damage evidence. The trial court's express acknowledgment and reference to preservation of McDermott's claims for crane damages and their receipt in

proffer, specifically for appeal, at Petition Appendix pp. A-48-49, could hardly be clearer. Moreover, McDermott filed a "Memorandum in Support of Motion to Reconsider Claims Denied Pursuant to East River," which expressly argued for its right to bring contract *and* tort-based claims against River Don *and* AmClyde for both Shearleg Crane and Deck damages.[7] The trial court's rulings must be understood in this context. Respondents do not merely ignore these facts, but based their argument on the fiction that physical pleadings in the trial and appellate records do not exist.

CONCLUSION

Petitioner prays that this Honorable Court grant a writ of certiorari to resolve the conflict and confusion in federal maritime law over whether a defendant may urge that it is not liable for an injury at trial, then obtain a credit for the pre-trial settlement of other defendants to whom the trial defendant pointed to mitigate its own comparative fault. Petitioner further prays for issuance of the writ of certiorari to review the Court of Appeals' erroneous denial of all recovery of any kind against AmClyde and the denial of recovery against River Don

[7] In light of Respondents' assertions, Petitioner reproduces this Memorandum in the attached Supplemental Appendix. It was also reproduced as Record Excerpt 3 attached to McDermott's "Petition for Rehearing En Banc" to the Court of Appeals.

for Shearleg Crane damages, and for all other relief to which Petitioner may be entitled herein.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MCDERMOTT, INC.

VERSUS

CLYDE IRON, RIVER DON CASTINGS LIMITED, BRITISH ROPES LIMITED AND INTERNATIONAL SOUTHWEST SLING INCORPORATED

CIVIL ACTION
No. H-88-2429
(Filed NOV 14 1990)

PLAINTIFF'S MEMORANDUM IN IN [sic] SUPPORT OF MOTION TO RECONSIDER CLAIMS DENIED PURSUANT TO EAST RIVER

MAY IT PLEASE THE COURT:

I. INTRODUCTION

River Don, before opening argument, raises an issue never before raised in the context of this litigation with application to River Don Castings. The pretrial order, as signed by River Don, does not, in the disputed issues of fact or law, challenge McDermott's legal right to recover, under tort or contract, from River Don Castings. Now, at this twelfth hour, counsel for Clyde, now River Don who settled with each other, minutes before trial, seeks to advance arguments previously advanced *only* on behalf of Clyde.

Counsel for Clyde *ne* River Don, sought orally to rely on *East River, Shipco, "Oxy Producer", Dreyfuss* and *Nicor* to protect River Don. In support of a theory that would relieve a manufacturer of defective parts from *any* liability for putting defective parts into the market place,

Counsel for River Don argues, without apparent authority, that 1) because of *East River* the only remedy when a product injuries itself is in contract, and, 2) there is no express contract between River Don and McDermott, 3) McDermott is without remedy. River Don argues, in effect, that unless the component maker becomes specifically part of the seller's contract that all rights in product liability are waived. This is a gross misstatement of law and fact. The true issues are: 1) Was the deck "other property" and 2) What remedy does McDermott have against River Don?

II. The Deck Section:

Nicor holds clearly that property such as the Deck, is "other property". In *Nicor*, which deals with the vessel, even though equipment had been *welded* to a vessel, it was still considered "other property." This "other property" was easily distinguishable because it was not the object of the contract that built the vessel. The court held:

> "Neither the added equipment nor the structural changes were "the object of the contract" between Halter and Nicor; the M/V Acadian Sailor, as delivered to Nicor, was the product of the bargain."

It is incomprehensible, even in light of River Don's rather outlandish claims that they believe fabrication of a Deck for Sohio was the product of any contract between McDermott and Clyde/River Don for a crane/hook.

The court further held:

> "These appurtenances must be considered "other property," separate from the product that

> the manufacturer originally sold, if the distinction enunciated in East River between a: "product" and "other property" is to have any meaning."

Counsel for Clyde/River Don relying exclusively on "cargo" cases says that the deck is not "other property". The court in *Nicor* answered this argument simply:

> "In a parenthetical description of another case, contained in a footnote, this court recently stated in Employers Ins. of Wausau v. Sawannee River Spa Lines, inc. that the "loss of cargo is not damage to 'other property' within [the] meaning of East River." That statement relies upon a similar observation in our earlier opinion in Louis Dreyfuss Corp. v. 27,946 Long Tons of Corn. To the degree, if at all, that these statements suggest that the additions to the vessel involved in this case are not "other property," they are *obiter dicta*, not precedent."

III. What remedies is McDermott entitled to against River Don for the Crane.

As stated counsel for River Don *ne* Clyde advances a novel theory of law: i.e., the only recovery available to an injured party when a product injuries itself is in contract, and if there is no contract then the party is simply out of luck. Fortunately, product liability does not operate so cavalier.

East River held as a threshold issue that:

> "a manufacturer *in a commercial relationship* has no duty under either a negligence or strict products-liability theory to prevent a product from

> injuring itself [*emphasis added*] *East River* at 476 U.S. at 870-871, 106 S.Ct. at 2302.

Shipco, which stated that the dissent by Judge Gee in *Jigg III* (which was overruled by *East River*) was consistent with the Supreme Court in *East River* quoted Gee:

> *"I would hold that the general maritime law should not and does not recognize a tort based product-liability cause of action based either on negligence or strict manufacturer liability when there is privity and when the only loss suffered results from damage to the defective product itself."*

Where is River Don's privity? In *Shipco*, Avondale was the manufacturer in privity with Shipco. McDermott has no express contract with River Don. McDermott did not negotiate with River Don. McDermott has no privity with River Don. McDermott has no commercial relationship with River Don. The question may be asked: What bargain is McDermott a beneficiary of? In *Shipco* the court held:

> In applying the rule adopted by *East River*, that one party to a commercial transaction cannot recover in tort for economic loss that arises from damage to the product itself but may recover for such loss that arises from damage to "other" property, appellants' argument arises [sic] the question – what is the product?

River Don and McDermott are not parties to a contract or a commercial transaction. As *Shipco* quoted *East River*:

> The underlying reason the Court in *East River* denied a tort cause of action to the purchaser for

> economic loss resulting from damage to the vessel was because such losses represent "the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law. 476 U.S. at ___. 106 S.Ct. at 2302, 90 L.Ed. at 876."

Where in the McDermott/Clyde contract did McDermott waive its rights to remedies against third party manufacturers? Clyde states it does not warrant other manufacturers' products. In fact did not the contract specifically allow:

> "This warranty does not extend to normal wear and tear or to the equipment, materials, parts and accessories manufactured by others, and THE BUYER AGREES THAT IT MUST RELY SOLELY ON THE MANUFACTURER'S WARRANTIES APPLICABLE, AND THAT IT SHALL HAVE NO REMEDY AGAINST THE SELLER FOR BREACH OF A MANUFACTURER'S WARRANTY."

Now Clyde seeks to specifically breach the right it gave to McDermott to seek redress against manufacturers for parts it claims it did not warrant. Clyde uses *East River* as sword and shield by claiming privileges for parties to whom McDermott was unaware at the time the contact [sic] was negotiated. In effect, Clyde argues that if Clyde had had all parts manufactured by companies other than themselves, then McDermott would have no remedies because they disclaim specifically equipment not of its manufacturer and there are no contracts with the others. Where in law does it appear that a manufacturer receives blanket immunity because it is a third party? This is not law, this is a shell game.

Clyde/River Don relies on "Oxy Producer". Oxy Producer dealt with a service contract wherein Occidental had a negotiated contract with the designer. Clyde/River Don relies on *Nicor* because the engine manufactured by General Motors was a component part of the vessel built and sold by Halter. However, even though a component part maker, General Motors had a directly [sic] contract with Nicor:

> *"because the contract between General Motors and Nicor expressly disclaimed General Motors' liability for negligence arising out of the purchase of the engine, Nicor's claim does not fall into the possible exception to East River carved out by the Miller Industries and McConnell courts."*

As we can see, in each of the cited cases there existed a direct negotiated contract between the plaintiff and the component maker or service provider. In this case no such express contract exists. In each of the cited cases there was a benefit to the plaintiff through a negotiated commercial transaction between two parties, such is not the case here. This court has created an exception not found anywhere in law wherein a user of a product has been restricted from claims against a tort feasor because he did not have a direct express contract, which, if he had, would have abrogated the a [sic] tort remedy. Without any express contract between McDermott and River Don, there is no negotiation or commercial transaction and therefore this court cannot limit remedies against River Don. To do this is absolutely contrary to all products liability since *MacPherson v. Buick Motors Co.*, 217 XY 382, 389 111 N.E. 1050, 1051, 1053 (1916). To leave such a ruling standing is clearly reasonable [sic] error.

IV. WARRANTIES BY RIVER DON

McDermott claims implied warranties from River Don. If McDermott moves breach of implied warranties by River Don, McDermott is allowed full recovery including damages to the crane. Failure to allow McDermott to discuss crane damages is reversible error by the court.

V. WARRANTIES BY CLYDE

McDermott claims breach of contract, breach of express warranties, and the failure of essential purpose. If the court does not allow the plaintiff to address damages to the crane which would be recoverable if any of these issues is proven, it is reversible error by the court.

WHEREFORE, Plaintiff, McDermott moves this court to prevent a material and reasonable matters previously decided [sic]. *Effect of East River-* McDermott, Inc. reurges its previously filed memoranda on the proper interpretation by reference. Furthermore, McDermott objects to the court's ruling. This opposition memoranda in Response to River Don's Motion was prepared overnight *during trial* in response to a "surprise" Motion of which this counsel was presented copy *at trial* today. This issue had never been raised previously by River Don. It is not listed as a contest [sic] issue of law by River Don in the pretrial order signed two working day's before trial. McDermott's counsel was given no opportunity to file a response before being called into judge's chambers, unprepared, to orally argue the merits at approximately 12:00 noon. The court announced its ruling before opening arguments and instructed McDermott's counsel to not

make any reference to Shearleg Crane damage either in opening argument or during the pendency of trial.

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